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July 21, 1993

BY HAND

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: MM Docket No. 92-266

Dear Ms. Searcy:

Please find enclosed, on behalf of the National Association of Telecommunications Officers, et al., an original and eleven copies of Opposition of NATOA, et al. to Petitions for Reconsideration and Clarification in MM Docket No. 92-266.

Any questions regarding this submission should be referred to the undersigned.

Sincerely,

William E. Cook, Jr.

William E. Cook, Jr.

Enclosures

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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	MM Docket No. 92-266

TO: The Commission

OPPOSITION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION

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July 21, 1993

SUMMARY

Local Governments believe the cable rate regulations adopted by the Commission in this proceeding represent a significant step towards achieving the congressional goal of establishing "reasonable" rates for cable subscribers in areas not subject to "effective competition."

In their Petition in this proceeding, Local Governments highlighted those modifications to the Commission's rules necessary to ensure that cable consumers pay reasonable cable rates. In this Opposition, Local Governments have briefly elaborated on certain proposals raised in their Petition, and supported additional proposals raised in petitions by other parties. Among other things, Local Governments urge the Commission to adopt proposals that would:

-- permit franchising authorities to enforce service provisions in franchise agreements, including provisions for "lifeline" service, as permitted by law;

-- not require franchising authorities to demonstrate insufficient resources as a precondition of basic rate regulation by the Commission; and

-- not presume, for purposes of determining whether a cable system is subject to effective competition, that SMATV services are capable of serving 50 percent of a franchise area.

Local Governments also urge the Commission to reject proposals by cable and programming petitioners that would undermine the congressional goal of "reasonable" rates. Among other things, Local

Governments specifically urge the Commission to reject proposals that the Commission:

-- eliminate "tier neutral" regulation of basic and cable programming service tiers, and regulate only "egregious" cable programming service tier rates;

-- significantly expand the types of "external" costs that may be directly passed through to cable subscribers;

-- require joint certification by franchising authorities regulating a single cable system;

-- prohibit refunds of basic rates;

-- shorten the time period for a franchising authority's review of a basic rate request, and permit rates to become effective pending such review;

-- implement a formal hearing requirement and other formal due process safeguards in situations where there is a dispute between a franchising authority and a cable operator;

-- restrict a franchising authority's access to proprietary information;

-- subject only equipment and installation necessary to receive basic cable service to basic rate regulation;

-- permit cable operators to advertise rates for cable service that do not include certain itemized costs;

-- exempt small cable systems from substantive rate regulations, and increase the category of cable systems qualifying as "small cable systems"; and

-- permit cable systems with rates below the benchmark rate to raise them to the benchmark rate.

Local Governments believe that adoption of these proposals would be to the detriment of the public interest in affordable cable service, and would impose undue administrative burdens on the Commission and franchising authorities.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

TO: The Commission

OPPOSITION BY THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, THE NATIONAL LEAGUE OF CITIES, THE UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES TO PETITIONS FOR RECONSIDERATION AND CLARIFICATION

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, the "Local Governments") hereby submit this Opposition to Petitions for Reconsideration and Clarification in the above-captioned proceeding.

I. INTRODUCTION

Various parties have filed petitions challenging the regulations the Federal Communications Commission ("Commission") adopted to implement Section 623 of the

Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").[1] Local Governments believe the regulations adopted by the Commission represent a significant step towards achieving the congressional goal of establishing "reasonable" rates for cable subscribers in areas not subject to "effective competition."[2]

In their Petition, Local Governments highlighted those modifications to the Commission's rules necessary to ensure that cable consumers pay reasonable cable rates.[3] Below, Local Governments have briefly elaborated on certain proposals raised in their Petition, and supported additional proposals raised in petitions by other parties.

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[1] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] In addition to revisions, several petitioners request that the Commission delay the effective date of its rules pending its consideration of the petitions in this proceeding; the adoption of its cost-of-service regulations; or the completion of any other proceedings in this docket. See, e.g., Petition for Reconsideration by Wometco Cable Corp., et al., filed June 21, 1993, at 13-14. Local Governments oppose these petitioners, and believe a stay of the effective date of Commission's rules until some indefinite date in the future would undermine the congressional goal of prompt rate relief to consumers. Congress mandated prompt protection from unreasonable rates charged by cable operators. See Sections 623(b)(1) and (c)(1).

[3] Petition for Reconsideration and Clarification by NATOA, et al., filed June 21, 1993 (hereinafter "Local Governments Petition").

However, Local Governments mainly address in this Opposition proposals by cable and programming petitioners that would undermine the congressional goal of establishing reasonable rates for subscribers in areas not subject to effective competition, while ensuring that such regulations do not impose an undue administrative burden on the Commission and franchising authorities. Local Governments urge the Commission to deny the petitioners' proposals addressed below, and other proposals raised in petitions, that would undermine or gut the rate regulatory regime established by the Commission. The grant of such petitions would be to the detriment of the public interest in affordable cable service.

II. DISCUSSION

A. The Commission Should Modify Its Rules Only to the Extent Required to Ensure that Cable Consumers Pay Reasonable Cable Rates

1. The Commission Should Permit Franchising Authorities and Cable Operators To Enter Into Service Agreements, Including "Lifeline" Service Agreements

Local Governments agree with King County

consistent with federal law.[4] We agree with King County that franchising authorities and cable operators should have the right, among other things, to establish the number of channels that appear on the basic tier and, for franchises entered into prior to December 29, 1984, to enforce specific programming requirements for the basic tier.

In particular, franchising authorities should be permitted to enforce franchise provisions requiring cable operators to provide tiers of service targeted for senior citizens and economically disadvantaged groups, such as "lifeline" tiers that are required in many cable franchises. The Commission's regulations should clarify that a franchise requirement that a cable operator establish a lifeline tier may be in addition to a cable operator's obligation to establish a basic tier under Section 623(b)(7). Although Congress mandated a specific basic tier, nothing in Section 623 prohibits cable operators from creating "sub-basic" tiers targeted at senior citizens and the economically disadvantaged. In fact, the provision of "lifeline service" by cable operators to such groups is entirely consistent with their right under the 1992 Cable Act to offer discounts

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[4] Petition for Reconsideration by King County, Washington; Austin, Texas, et al., filed June 21, 1993 (hereinafter "King County Petition"), at 21-25. See also Local Governments Petition at 30-31.

to senior citizens or other economically disadvantaged groups. Section 623(e)(1). "Lifeline" services are inherently "discount" services.

2. Franchising Authorities Should Not Be Required to Demonstrate Insufficient Resources as a Precondition of Basic Rate Regulation By the Commission

As Local Governments noted in their Petition, Section 622 of the Cable Act prohibits the Commission from requiring that, as a condition for regulation by the Commission of basic rates, a franchising authority demonstrate that its franchise fees are insufficient to cover the cost of basic rate regulation. See Section 622(i).[5] To the extent that the Commission reviews a franchising authority's resources based on grounds other than the use of franchise fees, such a franchising authority should not be required to demonstrate a lack of resources; a simple certification that it does not have resources to regulate should suffice. Such a certification requirement would be consistent with the requirement that franchising authorities wishing to regulate basic rates simply certify that they have the

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[5] Moreover, the Commission's proposals in this regard grossly distort the portion of Section 623(a)(3) concerning franchising authorities' resources, which was meant to protect consumers in cases where a municipality lacked adequate personnel to regulate rates. There is no evidence whatsoever that the provision was meant to protect the Commission from local jurisdictions shifting the responsibility of basic rate regulation to the Commission.

personnel to regulate rates. See FCC Form 328. The Commission should not impose a tougher regulatory burden on franchising authorities that do not have the resources to regulate.

3. SMATVs Should Not Be Presumed to Be Capable of Serving 50 Percent of a Franchise Area

For the reasons Local Governments stated in their Petition, the Commission should not presume, for purposes of the 50 percent penetration test under the effective competition standard, that a SMATV service "is technically available nationwide in all franchise areas," and actually available in most franchise areas. Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266 (released May 3, 1993) at ¶ 31 ("Order").[6] This presumption is inconsistent with reality -- SMATV services are not offered, and are actually not available, to all subscribers in every franchise area of the country. Indeed, as the Commission recognized, SMATV services typically provide service only to multiple dwelling units. Order at ¶ 31.

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[6] Local Governments agree with King County that such a presumption also should not be made with regard to TVRO services, which also are not actually available to subscribers nationwide. King County Petition at 15-16.

Local Governments understand that an accurate measurement of the area a SMATV service is capable of serving is difficult to determine. But such a measurement is not impossible, and will be easier to do over time. For instance, the Commission has stated that it will require competitors to cable operators to file information with the Commission regarding their "penetration and reach" within a franchise area. Order at ¶ 44 n.145. Such information should provide an accurate measurement of the extent to which a SMATV service in a franchise area provides cable service. Local Governments recommend that when a SMATV service states that it has the capability of serving 50 percent of the households in the franchise area (and at least 50 percent of the households in the franchise area are multiple dwelling units), such SMATV service should be included in measuring whether the 15 percent penetration test is met.[7]

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[7] Moreover, the Commission should not count any multichannel video programming distributors that do not have the capacity of serving 50 percent or more of a franchise area in determining whether the 15-percent penetration rate test is met under the effective competition standard. See, e.g., Petition for Reconsideration of Time Warner Entertainment Company, L.P., filed June 21, 1993, at 13-16 (hereinafter "Time Warner Petition"). By only including in the 15-percent calculation those systems capable of serving 50 percent or more of a franchise area, the Commission is ensuring that competitive cable service is a viable alternative in a significant portion of the franchise area, and that

[Footnote continued on next page]

B. The Commission's "Tier Neutral" Benchmark Regulation Is Consistent with the 1992 Cable Act and Is in the Public Interest

Local Governments strongly disagree with Petitioners who argue that the Commission should apply a different benchmark standard to cable programming service tiers, and should limit application of any benchmark standard on such tiers to a small number of the most "egregious" cable rates or to "outliers."[8] Congress intended for the Commission to eliminate monopoly rents in all cable service rates, and for equipment and installation to receive such services. Application of the same "reasonable" benchmark standard to both basic and cable programming service tiers will eliminate any need for cable operators to retier programming from basic to other tiers in order to recover their costs. Moreover, as the Commission recognized, the tier-neutral approach will help the Commission to ensure, as required by Section 623(h),

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rate regulation still occurs where competitors may only be "cream skimming" a franchise area, while the remainder of the franchise area is left without an alternative. Order at ¶ 36. Such a goal is consistent with congressional intent in implementing the effective competition standard, and is a reasonable interpretation of the standard.

[8] See, e.g., Petition for Reconsideration by Booth American Company, et al., filed June 21, 1993, at 2-4, and 8-10 (hereinafter "Booth Petition"); Time Warner Petition at 4-13.

that cable operators do not attempt to evade basic rate regulation by retiering programming from basic to other tiers of service.

Local Governments disagree with those petitioners who argue that Congress intended for basic and cable programming service rates to be regulated differently based on the fact that Congress stated that cable programming service rates should not be "unreasonable," and that basic rates must be "reasonable."[9] The fact that Congress requires that basic rates be "reasonable" and that cable programming service rates not be "unreasonable" reflects nothing more than a recognition of the active regulatory role to be taken with respect to basic rates and the re-active regulatory role to be taken with respect to non-basic rates. Congress did not intend for this difference to mean that the rates for

cable programming services should be regulated only if such rates meet some "egregious" standard.[10]

C. The Commission's Obligation to Ensure that Cable Subscribers Pay Only Reasonable Rates for Cable Service Requires a Limit on the Types of "External Costs" Cable Operators May Recover

Cable petitioners urge the Commission to provide special treatment for certain categories of costs that would gut --- and render meaningless -- the benchmark regulatory regime established by the Commission if the Commission granted the petitioners' request.[11] Local

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[10] In addition, the 1992 Cable Act's legislative history clarifies that Congress did not intend for a different standard of reasonableness to apply. In its discussion of rate refunds under Section 623(c), Congress states that "there will be a period of time between the filing of an unreasonable cable rate complaint and the Commission's determination of a reasonable rate." H.R. Rep. No. 628, 102d Cong., 2d Sess. 87-88 (1992) ("House Report"). The Senate Report states that, "for systems not subject to effective competition, the FCC shall establish reasonable rates for cable programming services . . . if it finds the current rates are unreasonable." S. Rep. No. 92, 102d Cong., 1st Sess. 74 (1992).

[11] The petitioners ask the Commission to broaden drastically the category of "external" costs to include, among other things: (1) costs for capital expenditures, upgrades and expansions; and (2) possessory taxes, business license fees, and other exogenous costs generally applicable to all businesses. Moreover, petitioners request that the Commission also modify its current external cost rules to: (1) permit cable operators to recoup all increases in external costs incurred since September 30, 1992; (2) permit cable operators to recoup retransmission consent fees incurred this year as external costs; (3) eliminate or modify the difference in treatment between costs for affiliated and non-affiliated programming; and (4) permit the inclusion

[Footnote continued on next page]

Governments already are concerned that the "external costs" cable operators are currently permitted to recover under the Commission's rules may result in cable subscribers paying unreasonable rates for cable service. Such a concern is compounded by the fact that the Commission -- at least thus far in this proceeding -- has not required cable operators to reduce current rates to a level that would eliminate monopoly rents.[12]

In addition to the above concerns, modifications requested by petitioners to the Commission's external costs rules are inconsistent with the basis for the Commission's benchmark rates, and raise a number of practical issues that would severely increase the administrative burdens of complying with the Commission's rate regulations.

[Footnote continued from previous page]
of a reasonable profit in the calculation of external costs.

Petitioners also ask the Commission to permit cable operators to pass through external costs at the time they are incurred, rather than on a yearly basis, as currently permitted by the Commission's rules. Local Governments oppose this request and also oppose petitioners' request that cable operators be permitted to increase rates as a result of the addition of programming on a service tier at the time such additions are incurred, rather than on a yearly basis.

[12] See Further Comments of NATOA, et al., filed June 17, 1993 (urging the Commission to recalculate the

First, except for franchise fees, the Commission's benchmark rates generally reflected all costs incurred by a cable operator. Cable operators should not be able to recover these costs a second time by treating them as external costs; such a recovery would be "double dipping" by the operator.

Second, in those extraordinary circumstances where the benchmark rate would result in a grossly unfair rate, the Commission has provided a mechanism -- cost-of-service regulation -- to ensure that costs not sufficiently accounted for by the benchmark rate are recoverable.[13] To the extent the benchmark rate is sufficient to permit a cable operator to recover such costs, any rate increase resulting from the "external" treatment of such costs would result in "double dipping" and unreasonable cable rates.

Third, the treatment of costs for upgrades and other improvements to cable systems as "external" costs

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[13] Congress did not intend for the Commission to impose cost-of-service regulation, especially not the common carrier-type of cost-of-service regulation the Commission recently proposed in the Notice of Proposed Rulemaking, MM Docket No. 93-215 (released July 16, 1993). See, e.g., House Report at 83 ("The Committee is concerned that several of the terms used in this section are similar to those used in the regulation of telephone common carriers. It is not the Committee's intention to replicate Title II regulation"). Given this legislative history, the Commission should permit cost-of-service regulation only in extraordinary circumstances, if at all.

should not be permitted since, as noted above, the benchmark rates established by the Commission have already taken such costs into account.[14] Such costs should be treated the same regardless of whether such upgrade or improvement is required by a franchise agreement. In order for an upgrade requirement to be in embodied in a franchise agreement, a cable operator must consent to it. The cable operator should not receive more favorable treatment just because its intent to upgrade its cable system has been reduced to a binding agreement.

Fourth, the treatment of "upgrade" costs and certain other costs as external costs may not be in the public interest since such treatment may require all cable subscribers of a cable system to finance such costs in the form of higher rates, even though only a minority of subscribers may actually receive benefits from such expenditures.[15] For example, cable operators

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[14] The benchmark rates reflected rates charged by all cable systems as of September 30, 1992, including those cable systems that had been recently upgraded or were in the process of being upgraded.

[15] Moreover, such treatment would unnecessarily increase the administrative burdens of rate regulation. Cable operators would engage in endless disputes with the Commission and franchising authorities over whether a capital expenditure or any slight improvement in the cable system is sufficient enough to qualify as an "upgrade" entitled to external cost treatment. Such disputes are better handled by requiring a cable

[Footnote continued on next page]

may undertake upgrades to expand upon the services they currently provide. A cable operator, for example, may enhance the ability of its cable system to offer per-view or per-channel programming, to provide additional tiers of service, or to provide other services. In those extraordinary circumstances where the benchmark rate does not already permit a cable operator to recover such costs, the operator should be limited to recovering such costs only from subscribers subscribing to the new services.

D. The Commission's Rules Governing Basic Regulation By Franchising Authorities Are Consistent with Its Statutory Obligation to "Reduce the Administrative Burdens" of Its Rate Regulations and to Ensure "Reasonable" Basic Rates

The Commission has established a method of basic rate regulation that permits franchising authorities to ensure that cable subscribers receive "reasonable" rates, consistent with the Commission's obligation to reduce administrative burdens on franchising authorities of such regulation. Local Governments oppose those petitioners that urge the Commission to adopt cumbersome

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[Footnote continued from previous page]
operator to submit a cost-of-service showing in those extraordinary circumstances where the benchmark rate has not sufficiently taken such costs into account.

regulations that would limit the ability of franchising authorities to protect consumers.[16]

Among other proposals, Local Governments specifically oppose suggestions that: (1) multiple franchising authorities regulating a single cable system be required to jointly file for rate regulatory certification;[17] (2) franchising authorities be prohibited from ordering rate refunds;[18] (3) franchising authorities be required to make rate decisions in a shorter period of time than currently permitted under the Commission's rules, or else permit rate increases pending review of rate requests;[19] (4) franchising authorities be required to hold formal hearings and institute other formal "due process" safeguards;[20] and (5) franchising authorities be permitted to obtain

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[16] However, Local Governments do not oppose suggestions that a franchising authority and a cable operator be able to settle rate cases, so long as the franchising authority has the sole option of determining whether to settle a case or to apply the Commission's regulations for determining a reasonable rate.

[17] See, e.g., Petition for Reconsideration by Arizona Cable Television Association, et al., filed June 21, 1993, at 8-9 (hereinafter "Arizona Petition").

[18] See, e.g., Petition for Reconsideration by the National Cable Television Association, filed June 21, 1993, at 30-32 (hereinafter "NCTA Petition").

[19] See, e.g., Booth Petition at 36-39.

[20] See, e.g., Petition for Reconsideration and Clarification by Viacom International Inc. at 20-21.

proprietary information from a cable operator only in cases where a cable operator submits a cost-of-service filing or seeks to justify equipment costs.[21]

1. Certification of Multiple Franchising Authorities

Congress clearly intended to allow franchising authorities that wish to jointly regulate a cable system that serves multiple franchise areas; however, Congress made clear that such franchising authorities should not be required to jointly regulate such a cable system. Congress plainly stated that Section 623 "is not intended to prohibit such joint regulatory authority, nor should it be interpreted to require such joint regulatory authority." House Report at 80-81 (emphasis added).[22] In view of such plain legislative history, it is inappropriate for the Commission to require joint regulation.

2. Refunds of Basic Cable Rates

The Commission is not prohibited from ordering refunds of the portion of basic rates that are found to be unreasonable. The fact that Section 623 specifically provides for the refund of cable programming service tier rates, Section 623(c)(1)(C), but not for basic

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[21] See, e.g., Booth Petition at 41-42.

[22] Moreover, state law may prohibit joint regulation of rates by multiple jurisdictions.

service tier rates, does not mean that Congress intended to prohibit basic rate refunds. The Commission's paramount obligation under Section 623 is to ensure that basic cable rates are "reasonable." Section 623(b)(1). In achieving this task, Congress permitted the Commission, without limitation, to adopt any "standards, guidelines, and procedures" to enforce reasonable rates. Section 623(b)(5). Congress did not indicate that the Commission would be prohibited from ordering refunds or taking any other remedial measures to ensure that rates are reasonable.

3. Time Period for Rate Review

Local Governments strongly oppose suggestions by petitioners that franchising authorities have a shorter period of time in which to make a rate decision, or else that the Commission permit a rate request to go into effect after the initial 30-day review period by a franchising authority, subject to a refund order when a decision is made. Local Governments believe that the time frame the Commission has adopted already provides franchising authorities the minimum amount of time necessary to ensure that rates are reasonable. Moreover, cable subscribers should not be forced to pay increased rates pending review by a franchising authority, even if they would be entitled to a refund of

any unreasonable amount paid during the review period. Such refunds may not fully protect consumers.[23]

4. Due Process Safeguards

The Commission should not establish a formal hearing process or other formal due process protections in rate proceedings involving a dispute between a cable operator and franchising authority. The regulatory structures franchising authorities have in place across the nation already take into account a cable operator's due process concerns, as required by law. To the extent cable operators believe such procedures are ineffective, cable operators have the right under the Commission's rules to challenge a franchising authority's decision at the Commission or in court. Local Governments urge the Commission to retain the flexibility it has granted franchising authorities in structuring rate proceedings. Such flexibility is consistent with the congressional command that the Commission implement regulations that do not impose undue administrative burdens.

5. Access to Proprietary Information

Local Governments oppose those petitioners who suggest that franchising authorities should have access

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[23] For instance, a household that chooses to disconnect cable service because it cannot afford the higher rate under review might then incur a reconnect fee once a more reasonable rate is established by the franchising authority. This would be unconscionable.

to proprietary information only in those instances where a cable operator has submitted a cost-of-service showing or is attempting to justify equipment and installation costs. Congress clearly intended for franchising authorities to have "such financial information as may be needed for purposes of administering and enforcing" Section 623. See Section 623(g). Section 623(g) does not indicate an intent by Congress that franchising authorities not have access to proprietary information. Nor should the Commission adopt such a limitation. Limits on a franchising authority's access to proprietary information would undermine the ability of such authority to determine whether a rate is reasonable.[24]

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[24] For instance, in order to ensure that "implicit" rate increases (i.e., the rate remains the same although costs have gone down) have not occurred as a result of changes in programming on a service tier, a franchising authority would have to have access to programming contracts, which may contain proprietary information, to determine whether the cable operator has experienced a decrease in costs justifying a decrease in rates. A franchising authority would not have access to such information if the restrictions on access to proprietary information proposed by petitioners were adopted.